

# The BAR ASSOCIATION BULLETIN

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Vol. 3

JANUARY 5, 1928

No. 9

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## Amendments to the Corporation Laws by the Legislature of 1927\*

By JAMES S. BENNETT of the Los Angeles Bar.

The Legislature of 1927 saw fit to revise the non-par value stock provisions of the Civil Code in the light of the decisions of the Supreme Court during the previous year, to revise the sections of the Code providing for the manner of increasing capital stock to conform to the amendments of the constitutional provisions dispensing with publication of notice of a stockholders' meeting, to revise the provisions in respect to charitable corporations, to confer larger powers on the stockholders of cooperative corporations, to authorize a new form of finance company, to submit a constitutional amendment authorizing limited liability corporations in substantially the form defeated ten years ago, and to make a number of other less important changes to which attention is briefly called as follows:

The sections of the Civil Code authorizing non-par value stock were amended by striking out the provision preventing such stock being preferred as to dividends or as to its distributive shares in the assets of the corporation and inserting a provision: "That in the event the articles of incorporation provide for such classification they shall state in a clear and a succinct manner the nature and extent of the preference granted, and except as to the matters and things so stated no distinction shall exist between said classes of stock or the owners thereof; provided, however, that no preference shall be granted, nor shall any distinction be made between the classes of stock either as to voting power or as to statutory or constitutional liability of the holders thereof to the creditors of the corporation." (Sec. 290b.) The provision is allowed to stand in the section that: "Any and all shares issued as permitted by this section shall be deemed fully paid and the holder of such shares shall not be liable

to the corporation in respect thereof. The stated capital is to consist of the aggregate of the amounts received by the corporation as consideration for the issuance of its shares and of such additional amounts as from time to time may by resolution of the board of directors be transferred to its stated capital." (Sec. 290b.) In this manner the legislature accepts the suggestions of Mr. Justice Richards in *Westlake Park Investment Co. v. Jordan*, 198 Cal. 609, and the Secretary of State is accepting articles of incorporation in which preferred non-par value stock has a preference in the assets as well as in the dividend rate. The Supreme Court has not given adequate consideration to the question incidentally raised by *Del Monte Light & Power Co. v. Jordan*, 196 Cal. 488, and *Land Development Company v. Jordan*, 198 Cal. 346, as to whether any preference as to capital assets between different classes of stock in a California corporation is valid under Sections 3 and 12 of Article XII of the Constitution. When at some future date the control of a corporation seems important to the owners of the preferred stock having a capital asset preference of \$100.00 a share, it remains to be seen whether their voting rights will be held equal share for share with the common stock where the stock was sold in units of one share of preferred and one share of common for a price of \$125.00 a unit and the payment there out of a commission of twenty percent on the selling price, and the capital assets have not been increased. The directors of the corporation assenting to the creation of any debt in excess of the amount of the stated capital as stated in its articles of incorporation or an amendment thereto are made liable jointly and severally for the debts of the corporation "in excess of the amount of stated capital paid in at the time when such debts were created," with a special statute of lim-

\* EDITOR'S NOTE: This is the sixth of a series of articles by representative experts discussing Amendments by the 1927 Legislature to the Codes of California.

itations of one year, and the right of subrogation to any director paying the debt. (Sec. 290c.) For the purpose of determining the filing fee of the secretary of state on incorporation the value of the non-par share is to be taken at the sum of \$10.00 (Sec. 290d). The provision of Section 362 prohibiting a corporation from increasing or decreasing its capital stock by amending its articles is not to apply to no par value stock (Sec. 290e). Any such corporation is permitted to change the number of its shares by stating in its amended articles the matters and things required by Section 290b excepting the amount of stated capital with which the corporation will begin business, and it is likewise permitted to give the stock a par value by stating in its amended articles the amount of its capital stock and the number of shares into which it is to be divided and the par value thereof, it being particularly provided that: "In adopting amended articles as authorized by this section a corporation may also provide for any other amendments not contrary to law." (Sec. 290f.)

The provisions of the Code affirming the constitutional right of every stockholder to cumulate his votes is amended so as to exclude from the operation of the section: "Cooperative corporations formed for agricultural purposes or for the purpose of marketing or manufacturing agricultural products where it is expressly prohibited in their by-laws." (Sec. 307.) The constitution provides for cumulative voting with the exceptions: "That members of cooperative societies formed for agricultural, mercantile and manufacturing purposes may vote on all questions affecting such societies in the manner prescribed by law." (Constitution Article XII, Sec. 12.) The question will naturally arise as to whether the classification of the statute is a reasonable subclassification of the constitutional exception.

Immediately after their election the directors are required to organize by the election of a president, who must be one of their number, one or more vice-presidents, a secretary and a treasurer (Sec. 308). The words added by amendment are, "one or more vice-presidents," and we shall be asked whether this sets at rest the question of whether a vice-president exercising the powers of the president in his absence or disqualification must be a member of the board of directors. By an amendment, "The

meetings of the stockholders or members and board of directors or trustees of a corporation must be held at its principal place of business or at an office within this state designated for such purpose in its by-laws." (Sec. 319.) If this definitely settles the plan of meeting, we shall probably be asked whether, if all the members of the board of directors or trustees meet at some place other than the principal place of business or an office designated in the by-laws and sign a waiver, action taken at such a meeting will be binding upon third persons dealing with the corporation or on direct attack by stockholders.

The procedure adopted in 1925 for the distribution of capital assets prior to dissolution has been amended to provide that the procedure will not apply: "To the purchase of its own preferred stock by a corporation which is in actual liquidation and which has no unsecured indebtedness, and any such corporation may with the written assent of the holders of at least two-thirds of its issued and outstanding preferred stock purchase and retire and cancel all or any part of such preferred stock upon obtaining a permit therefor from the commissioner of corporations." (Sec. 309½). This throws back upon the commissioner of corporations the matter of providing a procedure in the excepted cases, but more important than that of procedure is the power of the commissioner to grant a permit on the consent of preferred stock alone without the owners of the common stock being consulted on the purchase of the preferred stock out of capital assets or on the price to be paid.

The provision for publication and service of notice of an assessment is amended to read that notice must be published: "For four successive weeks in some newspaper of general circulation and devoted to the publication of general news published at the principal place of business of the corporation and also in some newspaper published in the county in which the works of the corporation are situated if a paper is published therein." (Sec. 345.) The amendment strikes out the provision that the notice must be published at the place designated in the articles of incorporation as the principal place of business and dispenses with publication at the place where the works are situated if the works are outside of the United States. Read in connection with the provision that the stock-

holders and directors may meet at its "principal place of business or at an office within this state designated for such purpose in its by-laws," may the publication now be made at a principal place of business fixed by the by-laws where this is not the principal place of business stated in the articles of incorporation? No order extending the time for the performance of any act specified in any notice of an assessment or assessment sale is effectual unless notice of such extension or postponement is published at least once within two weeks prior to the time last previously set for the performance of said act (Sec. 345).

The code provisions for increasing and diminishing the capital stock and creating or increasing bonded indebtedness are amended to conform to the amendment to the constitution adopted at the preceding election (Art. XII, Sec. 11). Corporations with capital stock having a par value may now increase their capital and create and increase their bonded indebtedness by the written consent of two-thirds in interest of their stock without the necessity of a stockholders' meeting or the publication of notice heretofore required (Sec. 359).

Decisions of the Supreme Court of the United States holding unconstitutional, franchise and license tax statutes of other states substantially the same as those in California, which decisions are followed in *Perkins Manufacturing Company v. Jordan*, 73 Cal. Dec. 384, have had the result of turning back the hand of the legislative clock to the situation existing in 1915. Any foreign corporation doing an interstate business is again by the Civil Code required to file a copy of its articles and amendments with the secretary of state and in the office of the county clerk of the county where its principal place of business is located and where it owns any real property, and also to file in the office of the secretary of state a designation of some person residing in the state upon whom process may be served (Secs. 405-6). Cognate amendments give foreign corporations complying with these provisions the benefit of the statute of limitations of this state and impose penalties for failure to comply, and protect the corporation so complying against domestic corporations taking a name so similar to that of the foreign corporation as to tend to deceive (Secs. 408-9-10).

The legislature again proposed an amendment to the Constitution providing

for the organization of "limited" liability corporations in which the stockholders will be exempt from direct liability for their proportionate part of the debts of the corporation, the amendment being in substantially the form as that proposed and defeated at the general election in 1917 (Constitution Article XII, Sec. 3).

A new section provides for the organization of charitable corporations upon the approval of the commissioner of corporations and the attorney general that the proposed corporation is sought to be organized in good faith and strictly for charitable and eleemosynary purposes. The powers and duties of the trustees are somewhat different from those under the Code prior to the new act (Sec. 606). Section 598 requiring the approval of the superior court on the mortgage and sale of property is repealed.

A new form of finance corporation is authorized, designated as a Credit Union, for the twofold purpose of promoting thrift among its members and creating a source of credit for them at legitimate rates of interest, which may be incorporated under the general incorporation law except as provided in the new act (Stat. 1927, p. 51). The stockholders through the by-laws are given greater control over the affairs of the corporation than in the ordinary business corporation. The powers of supervision and examination are lodged in the commissioner of corporations. The act relating to non-profit cooperative viticultural and horticultural corporations is amended to extend the powers of members and correspondingly restricting the powers of the directors (Sec. 635p). The act relating to non-profit cooperative corporations is amended to extend the powers of the members and correspondingly restrict powers of the board of directors. (Sec. 653w.) The manner of forming mutual benefit and life associations by filing original articles with the secretary of state, and which change was apparently overlooked in 1925, has now been amended to conform to the general corporation law in this respect (Sec. 452a). An amendment confines the definition of the term "mortgage insurance company" to one doing business "in this state" and removes the ambiguity as to whether a guarantee of payment by other than a corporation organized under the act shall constitute a policy of mortgage insurance by eliminating the words "by a mortgage insurance company."

(Continued on Page 18)

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## The Membership Campaign

Without precedent in the history of Los Angeles Bar Association are the results achieved by the membership campaign now coming to a close. Since March 1, 1927, the membership of the Association has been increased from 1835 to approximately 2600, an increase of 40%.

In spite of the fact that the State Bar was being organized and all attorneys compelled to pay a state license fee, over seven hundred new members were added to the roster of Los Angeles Bar Association. This remarkable result was attained through the co-operation of over three hundred attorneys who volunteered to serve on the committee and by the very effective aid rendered by the judges of the courts. Every one of the thirty-eight Superior Court judges joined in the membership campaign. In closing the campaign, the following open letter has been issued by the judges to members of the bar:

"To the Members of the Bar of Los Angeles County:

"The Los Angeles Bar Association aims to be a fully representative body, gathering into its fold all the members of the legal profession in the county who are in sympathy with its high purposes and who conform to the standards of professional conduct which it advocates.

"The activities of our Association are varied. It endeavors to promote in the Bar the *esprit de corps* and the professional dignity which are the pride of the Bars whose traditions are older than ours,—to aid in the improvement of the administration of justice, both civil and criminal—to make modern law a continually more efficacious social engineering.

"We respectfully urge all members of the Bar who are in accord with these

most worthy ideals and purposes to actively affiliate with Los Angeles Bar Association.

"Yours sincerely,

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## The Trial Lawyer and His Art\*

By NORBERT SAVAY of the Los Angeles Bar

For the past twenty years the author of this article has made a special study of the above subject to the extent that often he has gone hundreds of miles out of his way to interview some noted trial lawyer or to be present at the trial of some cause celebre. In this way he formulated the conclusions appearing herein from actual observation and acquaintance with many of the foremost trial lawyers in this and in other countries of the world. Besides he himself has specialized in trial work and has had fifteen years trial experience in the courts of New York State.

As is well known, the members of the bars of England, France, and of other countries on the continent of Europe, are divided into barristers and solicitors, or advocates and avoués, the former making court work their highly specialized function.

Not only does such division not exist in the United States but the average practitioner in this country considers himself fully competent in handling any and all court work which may come his way.

There is, however, an increasing number in our profession who believe that trial work of an attorney requires as much specialization as the surgical work of a physician. Among these there will be found many extremists who hold that a trial lawyer is born, and no amount of training can make him such. Some contend that a successful trial lawyer must be an orator, or be endowed with pleasing personality, keen wit, etc.

It is to analyze the qualities and requisites of a successful court lawyer in the light of the above mentioned investigation and experience, that these articles have been written. They are from the chapters intended for a book under the same title, but

owing to the limited space in these pages the material had to be greatly cut down.

We shall consider the subject from two aspects:

I. Personality of the trial lawyer.

II. Technique of the trial lawyer.

Under the first subdivision we shall examine the innate and the acquired qualities which the successful trial lawyer of today must possess; under the second heading we propose to outline the fundamental rules to which every expert trial lawyer adheres with meticulous particularity.

### I

#### *Personality of the Trial Lawyer*

The first point which presses itself on our attention in regard to the personality of the modern trial lawyer deals with his natural gifts. Must he be an orator? Not at all.

The fact of the matter is that ninety per cent of the successful trial lawyers of today are not gifted even with considerable fluency of speech. One of the most successful of these is Max D. Steuer of New York City, reputed to be making a million dollars a year. The writer has known Steuer for many years, but under no circumstances would he call the gentleman an orator or even an eloquent man. To his category belong such trial luminaries as John B. Stanchfield, now deceased, Frank Hogan of Washington, Martin Conboy of New York, Col. Wm. Rand and Wm. K. Jerome. None of these is endowed with oratorical ability, and yet they are among the most successful advocates of this generation. Martin W. Littleton of New York is among the few who are possessed of the gift of eloquence. But in the judgment of this writer Mr. Littleton is not in the same class with Max D. Steuer or Frank Hogan.

It is true that in the past, not so very far distant, great trial lawyers were of the

\* EDITOR'S NOTE: This is the first of two articles by Mr. Savay. Mr. Savay is the author of numerous books, including *WORLD'S LAWS OF TRADE*, dealing with the commercial laws of foreign countries. He was formerly a member of the New York Bar and has served as president of the American Society of Jurisprudence. In addition he has been on the staff of lecturers at Notre Dame University, Fordham University, and the University of Southern California.

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type of Joseph Choate—eloquent, brilliant, witty, enriched by nature with an extraordinary personality. Today the successful advocate is generally very much like the successful business man—plain, quiet, dignified, but extremely forcible and to the point. He rarely raises his voice above the conversational tone, and his chief weapons are logic and facts.

It seems that the old-time advocate, with his flood of brilliant utterance, his theatrical gestures and his dramatic voice made the last stand for his vanishing race at the Thaw trial of 1907, when Delphin Delmas was arrayed against District Attorney Jerome. The eloquence of the former fairly reached the skies and rocked the firmament of the entire world, but it broke like the sea waves against the solid rock, when business-like Jerome in a hushed voice gave "the Dementia Americana" its quietus. He had accomplished this with an array of logic which no hurricane of the most imaginative speech had the power to dissipate.

That memorable occasion marked the rise of a new type of advocate, the kind that tries his cases in a conversational tone of voice, relying mainly on logic, law and

facts. With these he carries his cause to a triumphant conclusion.

In regard to the outward appearance of the modern trial lawyer, the writer's observation has been that few, if any, among the eminent lawyers specializing in court work resemble Apollo of Belvedere. They are not as a rule even men of distinguished appearance. In fact, the contrary is generally true. For instance, one of the most successful trial lawyers of New York, reputed to be making over half a million dollars a year, had, when last seen, a face so dotted with pimples that it was almost repulsive to look at. He was dressed very shabbily and looked in other respects extremely commonplace.

The kind of personality the successful trial lawyer of today invariably possesses is the personality which inspires confidence. And that is essential; for he must be able to impress the jury that what he says is true; that he is sincere and that above all things he desires the accomplishment of the ends of justice.

In this connection the writer will never forget the tactics of one noted advocate who on being over-ruled by the trial court, time and time over again, was in the habit

of exclaiming, "But, Your Honor, I only want to bring out the truth, only the truth and nothing but the truth!" This little speech seemed to make an impression on the jury and apparently was often influential in bringing him a favorable verdict.

Among the essential qualities in the personality of the successful trial lawyer are aggressiveness, resourcefulness, astuteness, cool-headedness, intuition, logic and unusual memory.

The aforementioned Max D. Steuer has not a striking personality. He is terse to the point of exasperation. He speaks with the accent of one who has been brought up on the lower East side of New York. What is the secret of his astonishing success? It is due largely to his phenomenal memory. That man can go through a transcript of a thousand pages and remember every question he intends asking the witness on cross examination. Those members of the profession who have had extensive experience in court work know how difficult it is to remember every little detail in the examination of witnesses, and especially on summing up.

Added to this quality of extraordinary memory is his very thorough preparation of evidence. Outside of these factors, the most searching examination of the record of that remarkable man, who is now recognized as one of the foremost trial lawyers of America, does not disclose any other secret that would account for his phenomenal rise.

Thomas J. O'Neill, acknowledged to be the most successful negligence specialist of the New York Bar, among whose verdicts are many running into six figures, on being asked what was the secret of his success, answered with laconic twist: "Hit the bull's eye now and then as you go along in the trial of your case." He later explained that many lawyers beat about the bush so much that they lose the main point altogether and in the end bring the jury's mind into a condition of chaos.

"The average jurymen," he told the writer, "is a person of no extensive mental training; for that reason it becomes especially important to make the main points not only clear to him but overwhelmingly poignant."

All of which is worth remembering.

There is another quality which is very essential. It is the ability for logical correlation of facts. A great many practitioners are lacking in this quality to a remarkable

extent, and yet they manage to make a good living. But no trial lawyer can succeed without it, for the lack of it involves incongruity of thought, the inability to correlate facts and to draw from facts correct conclusions. Who has not heard many of the younger attorneys quoting cases as being in point which are ridiculously outside the point they are trying to prove?

A powerful trial lawyer is usually aggressive and full of action. Nothing is more tiresome than a long drawn out trial without exciting incidents. Clever advocates will enhance interest and attract the minds of the jury by snapping into sudden action now and then, some by a display of wit, others by a "wise crack" of some sort. Some occasionally even stage a quarrel with their opponent, knowing that a jury is apt to take a liking to a man who is possessed of a sense of humor or who is pleasingly aggressive at times.

We mentioned intuition. While not indispensable, it is an extremely useful quality in the selection of a jury, the introduction of proof and the summing up.

Prestige is of great help to a counsel in any kind of court case. Even a speaking acquaintance with the judge who presides at the trial helps. That is one reason why some lawyers are so anxious for their friends to become judges. And where is the lawyer of any considerable court experience who has at no time felt aggrieved at the treatment accorded him by a judge?

With the jury the kind of prestige that counts most is that which the counsel creates himself at the trial of his case, for even a famous man can make a fool of himself by his actions and thereby lower if not lose altogether the prestige which his standing inspired in the minds of the jury. That is where the importance of the art which can be designated as "trial tactics" comes into play. But of that we shall speak later.

Some writers on advocacy insist that a trial lawyer should be a good actor. This may be true if acting is so perfect that the player is lost in the play. But if the actor is discovered, the play will suffer, for the jury is quick to sense the chicanery of Shylock parading in the garb of Portia.

Prestige is important, but it never takes the place of the sincerity which an advocate should inspire in the jury. The writer has

(Continued on Page 30)

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## The President's Page

*Fellow Members,  
Los Angeles Bar Association:*

### BAR ASSOCIATION BUILDING

The outstanding event of 1928 in Los Angeles Bar Association activities will be the erection of the Bar Association Building between 6th and 7th streets at the intersection of Wilshire (when opened). Allison and Allison have sketched a beautiful Gothic structure which will be a permanent monument to the bar of this county.

Suggestions by the members generally as to size of offices, reception room and storage facilities, telephone and other arrangements will be greatly appreciated. We are already beginning to receive inquiries concerning space and interesting letters giving counsel and advice regarding the details of the building.

It is expected that the Association will make a substantial profit in this transaction, as it is understood that a differential of twenty-five cents a foot to cover extra service features will be allowed which will more than take care of these expenditures and should leave a balance of at least ten thousand dollars a year. In addition to this, we understand that it will be part of the arrangement that, if the building is entirely filled, the Association will receive the net income above ninety percent rentals. This should also give opportunity for a handsome income to the Association. With the co-operation of all the members of the Association, regardless of their office locations, there should be no reason why the Bar Association Building should not be completely filled. Every member of the Association will have a personal interest in seeing that the building is completely occupied and is financially successful. It must be remembered that in the arrangement contemplated, the Association will not assume any financial liability whatever. The arrangement is one which no doubt will be mutually profitable to both parties — the Association having the market at reasonable rentals, and the building company having the property which it is desirous of putting upon an income basis.

There will be a material saving in rental rates by reason of the wholesale basis of establishing them. There will be a saving

in library space on account of the Bar Association library being located in the building. There will be a saving to members of the bar who will no longer need to keep up individual libraries. Central phones on each floor will save overhead by reason of telephone service. A co-operative messenger and filing service will save materially in the time of clerks and juniors. The following figures for a suite of five offices and reception room have been furnished:

Saving in rental in Bar Association Building per month, from \$40.00 to \$80.00	
Saving in library space .....	\$70.00
Saving in library books, interest on investment, depreciation and upkeep .....	\$90.00
Saving in phone, one-fourth of one salary .....	\$25.00
Saving in time of clerk, filing of papers, etc. ....	\$25.00
Direct financial saving in overhead in office of typical suite, per month, should be from.....	\$250.00 to \$290.00.

There are many other conveniences. For those who live on the west side of the city, the proposed location of the building will save fully a half hour each day. The garage housed in the building will also be a time-saver and will enable attorneys to get to the courthouse from the Bar Association Building in ten minutes. There will be a saving by convenience afforded in conferences with other attorneys by reason of their accessibility. The Bar Association Building will contribute greatly to the integration of the bar. Proximity to each other will facilitate acquaintanceship among lawyers and contribute to the growth of a fraternal spirit.

This monument will enhance the self-respect of the profession. The cornerstone of the great English, French and Italian bars is the respect which each member has for the other. The Bar Association Building is one of the things we can be proud of, and the spirit of fraternity which it affords is one of the ideals that will be by this means visualized.

1928

We embark upon the new year greatly  
(Continued on Page 30)



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## December Meeting of Bar Association One to be Long Remembered

*The following pleasant comment concerning the December meeting of Los Angeles Bar Association was published, under date of December 29, 1927, by the CALIFORNIA INDEPENDENT, through the courtesy of whose editor it is here reprinted.*

The place for the December meeting of the Los Angeles Bar Association was admirably chosen; the Chamber of Commerce affords sufficient space. The dining room itself is commodious, ample; the halls and lobbies afford elbow room; and the diligent committee of arrangements had provided every convenience, both for those who had made reservations, and for those who had not. It was in all its details, the best planned and best managed meeting we have had for many a moon. The service at most of the tables was very satisfactory; we heard only a murmur or two, which may or may not have been justified. Another great advantage lay in the good acoustics of the dining hall, and its remoteness from the roar of street traffic.

The attendance was good, and the atmosphere, most of the time, was pervaded with the spirit of the season, good-will. There were other features of the meeting that are indescribable. The selection of a nominating committee, to choose officers for the ensuing year, provoked a lively contest, and at times several of the eager and excited members were clamoring for recognition, and speaking in a tumult of voices and the resounding whacks of the president's gavel. But there was no hysterics, there were no recriminations, and there were some good speeches, and others not so good; however, most of the speakers seemed to feel satisfied after they had relieved their minds.

Probably no other organization is so thoroughly democratic, in both theory and practice, as the Bar Association, or so free from cliques. For instance, should the members be dissatisfied with the report of the nom-

inating committee, when it comes in, twenty members can nominate an opposing ticket or opposing candidates. And yet, we heard the familiar and oft-repeated charge of a self-perpetuating oligarchy. Where they get that idea from it would be hard to say. We happen to have observed that during the past year a special effort has been made to enlist every member in some form of active work. Committees have been enlarged, and new committees have been created.

Anyone with a tyro's experience in organizations must know that in a body of two thousand men and women, it is utterly impossible to have every member an official or on some committee. Besides, for those who have a spark of esprit de corps there is always a service to be rendered in prompt and regular attendance, an attitude of helpfulness, and the making of carefully thought out suggestions "for the good of the order." Not a member anywhere need feel that he is ignored, not wanted, or unappreciated.

The address of the evening by W. T. Craig, a distinguished and able member, was good and timely. He discussed the new California Arbitration Law, compared it with the laws of other states, and pointed out its alluring possibilities of great and increasing usefulness. Fortunately for those who could not be present, the paper will be printed in a number of publications. Mr. Craig showed commendable patience and courtesy, in waiting until after ten o'clock to begin his address. The simple business of selecting that nominating committee consumed time without stint or limit.

We shall look forward to the annual report of the retiring officers with interest. The year 1927 has been a great year in association activities, in superior programs, in its number of distinguished and able visitors, and in its increase in membership.

## OPINIONS BY MEMBERS OF THE BAR ON LEGAL ETHICS QUESTIONS

### 3. EXAMINATION OF WITNESS

The following question was submitted:

Is it proper for an attorney in examining a witness to make unnecessary inquiry or comment upon the discreditable past of a witness or party?

Unquestionably such conduct is improper and should not be resorted to by any attorney.

Section 18 of the Canons of Ethics states: "A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities."

Because of the abuses of the right of

cross-examination, a number of states including California have adopted the rule prohibiting cross-examination as to irrelevant wrongful acts. Clearly it is unethical for an attorney to ask questions where he knows the court must sustain objections to such questions.

Comment during the examination upon the past record of a witness or party is highly improper and well merits a severe denunciation by the court. Under Code of Civil Procedure, sec. 2066, "It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor."

PAUL W. JONES.

(The foregoing opinion was approved by the Committee on Legal Ethics, composed of W. Joseph Ford, Chairman, Gurney E. Newlin, John O'Melveny, Theodore T. Hull and John Biby.)

## BULLETIN COMMITTEE

The series of articles now appearing in the BULLETIN dealing with Amendments by the 1927 Legislature to the Codes of California, has been exceptionally well received by members of the Bar Association, and has been provocative of much favorable comment.

The publication of this excellent series

was made possible through the efforts of a Bulletin sub-committee composed of Maurice Saeta, Judge Leon Yankwich, and William M. Rains, working in conjunction with Chairman Arthur M. Ellis. By virtue of the endeavors of the sub-committee, several of the articles composing the series were secured.

## AMENDMENTS TO CORPORATION LAWS

(Continued from Page 7)

(Sec. 453bb.) A new section imposes a penalty upon any corporation not organized under the act which shall engage as a business in issuing policies of mortgage insurance (Sec. 453g-g $\frac{1}{2}$ ).

Railroad corporation laws are amended to permit sale of properties to competing railroad upon the consent of stockholders holding of record at least two-thirds of the issued capital stock (Sec. 494). The section requiring a corporation doing a banking business to keep certain books open to inspection is repealed (Sec. 321) the matter being covered by the bank act.

Although indexed in the statutes to foreign corporations only, the legislature by Chapter 221 repealed the corporation license

tax (Stat. 1915, p. 422 being Act 1743 Deering's General Laws) preserving only sections 10 to 14, inclusive, and section 17 of the Act providing for the lien and the collection of past due taxes (Stat. 1927, p. 396). To make up for the loss to the state treasury by the repeal of the license tax, the franchise tax rate on corporations other than banks and public utilities covered by constitutional provisions was increased from one and six tenths percentum to one and eight tenths percentum (Pol. Code, sec. 3664d). It is currently reported that the State Board of Equalization is taking cognizance of the necessities of the state treasury by increasing the assessed value of corporation franchises subject to the amendment, and also that there are a number of cases pending questioning the validity of the increased rate as discriminating in favor of the classes of corporations to which the new rate is not made applicable.

# The Political Philosophy of Mr. Chief Justice Taft\*

By REUEL L. OLSON of the Los Angeles Bar

Author of *THE COLORADO RIVER COMPACT*

## II. Due Process and Freedom of Contract

### B. Due Process of Law

5. Function of administrative board as agency for marshalling public opinion.

The Pennsylvania Railroad sought to enjoin the United States Railroad Board from proceeding to require the new election as a step in settling the dispute. The District Court for the Northern District of Illinois entered a decree for the Pennsylvania Railroad Company enjoining the Railroad Labor Board from requiring a new election. This decree was reversed by the United States Circuit Court of Appeals for the Seventh Circuit. The decision of the Circuit Court was affirmed by the Supreme Court of the United States.

The conflicting claims involved in this case, therefore, were those of the Railroad Company which insisted that the right to deal with individual representatives of its employees as to rules and working conditions was an inherent right which could not constitutionally be taken from it, and those of the employees, or, at least, those who are members of the labor unions, who contend that they have a lawful right to select their own representatives and that it is not within the right of the company

to restrict them in their selection to employees of the company, or to forbid selection of officers of their labor unions qualified to deal with and protect their interests.

The reaction of the Supreme Court expressed by Mr. Chief Justice Taft, was as follows: (showing the nature of the Railroad Labor Board)

"But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees, or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to co-operate in running the railroad. \* \* The Board is to give expression to its view of the moral obligation of each side, as members of society, to agree upon a basis for co-operation in the work of running the railroad in the public interest. \* \* \* \* The jurisdiction of the board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the board decides they should do except the moral constraint, already mentioned, of publication of its decisions.

\*EDITOR'S NOTE: This is the fifth and last of a series of articles by Dr. Olson on this subject. The outline of the discussion covered in the series is as follows:

## I. Sovereignty and Jurisdiction

### A. Sovereignty

1. Claims of the nation in handling interstate commerce.
2. Jurisdiction over foreign corporations.
3. Two sovereignties coexisting in common territory.
4. Corporation standing in position of government.

### B. Nature of criminal jurisdiction.

1. Theories of criminal jurisdiction.

### C. The Jury System.

1. The jury system in Porto Rico.

## II. Due Process and Freedom of Contract.

### A. The Force of Statutes.

1. May be disregarded by courts.

2. Non-interference of courts with subjects

properly within jurisdiction of other authorities.

### B. Due Process of Law.

1. Elements of judicial controversy.
2. What is not a court.
3. Limits of administrative discretion.
4. Delegation of legislative power.
5. Function of administrative board as agency for marshalling public opinion.

### C. Freedom of Contract and the Police Power.

1. Service Letter Act of Missouri.
2. District of Columbia Minimum Wage Act.

### D. Methods of Dealing with Picketing.

1. One representative for each point of ingress and egress.
2. Requests to withhold patronage.

Conclusion.

"It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the railway company to recognize or to deal with or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen, with a view to securing a satisfactory co-operation, and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions, and the moral sanction. The Labor Board must comply with the requirements of the statute; but, having thus complied, it is not, in its reasonings and conclusions, limited, as a court is limited, to a consideration of the legal rights of the parties."<sup>1</sup>

When Mr. Chief Justice Taft declares that the Board is to give expression to its view of the moral obligation of each side, as members of society, to agree upon a basis of co-operation in the work of running the railroad in the public interest, and points out that under the Act there is no constraint upon the parties to do what the Board decides they should do except the moral constraint of publication of its decisions, he makes clear the function of this administrative body as a force for marshaling public opinion. This case emphasizes this work of the United States Railroad Labor Board. The Board may direct the parties to a dispute to do what it seems they should do. No one can say that whatever is thus directed to be done, is beyond the jurisdiction or scope of suggestion of the Railroad Board. But whether or not the thing suggested by the Board is actually carried into effect by the parties to the dispute concerning which the suggestion is made, is for the parties to determine. In case a party does not favor carrying out the suggestion, they need not give effect to it. The only disagreeable feature which they may thereby experience, will be an adverse public opinion. The Railroad Labor Board will not be enjoined from advising affirmative acts in accordance with suggestions made by the Board, but the parties themselves must determine whether

or not they will act in the manner advised by the Board.

The practical result which follows from this decision is that the parties to an interstate transportation dispute, in one sense, are between an upper and nether millstone. On the one hand, if they do not follow the Board's suggestion, they are liable to bear the brunt of an adverse public opinion as the result of the suggestions of a Labor Board which is all-powerful in directing the parties "to do what it deems they should do," and, on the other, if they do follow the suggestions of the Labor Board and in doing so infringe the legal rights or obligations of railroad employers or employees, the determination, enforcement, and protection of these rights is to be accomplished by the court without reference to the fact that such acts had been performed upon the suggestion of the Labor Board.

The manner of selection of the representatives of the laborers in the instant case was held to be properly within the scope of suggestion of the Labor Board. Whether or not the Pennsylvania Railroad Company will follow the mode of election suggested, is entirely within the power of determination of the Pennsylvania Railroad Company. That Mr. Chief Justice Taft recognizes the importance of moral restraint exercised by publication of the decisions of the Railroad Labor Board as a legitimate force in government shows that his political philosophy is not confined within the narrow grooves of crystallized legal rules but is broad enough to regard the institutions of government as the supple forms of organization made necessary to meet the needs of a complex social order.

The third group of cases to be discussed in this chapter deals with freedom of contract and the police power. It is interesting to note an early statement of the Chief Justice on this point.

"\* \* \* Under the changes and social conditions limitations of the Constitution affecting the right of property, the right of free contract, and the right of free labor may be qualified in a limited way without a breach of individual liberty and without removing or disregarding the fundamental ancient landmarks set by the Constitution of the United States. It is not that the court varies or amends the Constitution or a statute, but that, there

1. 261 U. S. 72, 84-85.

being possible several interpretations of its language, the court adopts that which conforms to prevailing morality and predominant public opinion."<sup>2</sup>

In the handling of actual cases, how has Mr. Chief Justice Taft arrived at conclusions conforming to "prevailing morality and predominant public opinion"? Two cases, in both of which the Chief Justice dissented, involved this point. In the first of these he wrote no dissenting opinion at all, but we must examine the case in order to see what it is with which he did not agree; and then we shall take up his point of view in the *Adkins v. Children's Hospital* case.

Missouri enacted a law which was known as an act for the protection of laboring men by requiring employing corporations to give a letter showing service of an employee quitting service of such corporation, and providing penalties for the violation of the Act. The Prudential Insurance Company refused to give one Cheek a letter signed by the superintendent or manager, setting forth the nature and duration of Cheek's service to the corporation and stating truly the cause of his leaving, as required by the Service Letter Law of Missouri. Cheek thereupon sued the Prudential Insurance Company to recover damages.<sup>3</sup>

The argument advanced by the corporation in support of the contention that the Service Letter Act was repugnant to due process of law under the Fourteenth amendment was that at common law an employer was under no obligation to give a testimonial of character or clearance card to his employee; that no man is compelled to enter into business relations with another unless he desires to do so, and upon the dissolution of such relations no man can be compelled to divulge to the public his reasons for such dissolution; that it is a part of every man's civil rights that he be at liberty to refuse business relations with any other person, whether the refusal rests upon reason or is the result of whim, caprice, or malice; that with a person's reasons for refusing business relations neither the public nor third persons have any legal con-

cern; that in the absence of a contract, either employer or employee may sever the relations existing between them for any reason or without reason, and may not be compelled to divulge the reason without material interference with his fundamental rights.

Mr. Justice Pitney, writing the opinion of the Supreme Court, agreed with the opposing argument that these common law rules may be altered by statute and with the decision of the supreme court of the state sustaining the Act as an exercise of the police power, though in truth it would have required no extraordinary aid, being but a regulation of corporations calling for an application of the familiar precept, 'sic utere tuo', etc., in a matter of general public concern. It was stated that the Service Letter Act did not put any obstacle or difficulty in the way of the making or termination of contracts of employment, or prescribe either terms or conditions. In this respect it was held to differ from the situation in Massachusetts where a proposed bill had a direct effect upon the relations between employer and employee, pending the employment.<sup>4</sup> Mr. Justice Pitney also pointed out that the statutes involved in *Adair v. United States* and in *Coppage v. Kansas* would have imposed obstacles in the making or termination of contracts of employment, and were therefore held unconstitutional. In *Adair v. United States* it was insisted that it was criminal for employers to discharge anyone because of membership in a union, and in *Coppage v. Kansas* it was insisted that it was criminal for employers to require as a condition of employment, that an employee should agree not to become a member of any labor organization during the period of employment. Statutes which would make such conduct criminal were held unconstitutional because they would have imposed obstacles in the making or termination of contracts of employment. The Service Letter Act, on the other hand, was held not to put any obstacle or difficulty in the way of the making or termination of contracts of employment,

2. William Howard Taft, *The Anti-Trust Act and the Supreme Court*, 1914, p. 47.

3. *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530, June 5, 1922.

4. "No employee of a railroad corporation shall be disciplined or discharged in consequence

of information affecting the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information." Opinion of the Justices, 220 Mass. 627 quoted in 259 U.S. 540 and 541.

nor to prescribe terms or conditions.

Mr. Chief Justice Taft and Justices Van Devanter and McReynolds dissented from the majority opinion as expressed by Mr. Justice Pitney. But no dissenting opinion was written. That being true, the only conclusion which one is justified in making is that Mr. Chief Justice Taft and those who likewise entered their dissent, believed that the Service Letter Act of Missouri placed an obstacle or difficulty in the way of the making or termination of contracts of employment, or prescribed terms or conditions which violated due process under the Fourteenth amendment.

In the case of *Adkins v. Children's Hospital*,<sup>5</sup> Mr. Chief Justice Taft makes reference to the "overreaching of the harsh and greedy employer."<sup>6</sup> This was the case involving the constitutionality of the Act of Sept. 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. Mr. Justice Sanford joined with the Chief Justice in a dissenting opinion, and Mr. Justice Holmes also wrote a dissenting opinion. Mr. Justice Sutherland delivered the opinion of the court, holding that legislation fixing hours or conditions of work may properly take into account the physical difference between men and women, but that in view of the equality of legal status now established in this country the doctrine that women of mature age require, or may be subjected to, restrictions upon their liberty of contract which could not lawfully be imposed on men in similar circumstances, must be rejected.

The appellee in the case was a woman twenty-one years of age employed by the Congress Hall Hotel Company as elevator operator at \$35 per month and two meals a day. She alleged that the work was light and healthful, the hours short, surroundings clean and moral, and that she was anxious to continue for the compensation she was receiving and that she did not earn more. Her services were satisfactory to the Hotel Company and it would have been glad to retain her, but was obliged to dispense with her services by reason of the order of the Board constituted by the Act and on account of the penalties prescribed by the Act. The wages received by the appellee were the best she was able to obtain for any work she was capable of

performing, and the enforcement of the order, she alleged, deprived her of such employment and wages.

In overthrowing the District of Columbia Minimum Wage Act, Mr. Justice Sutherland wrote:

"The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no casual connection with his business, or the contract, or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. \* \* The moral requirement, implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or the grocer to buy food, he is morally entitled to obtain the worth of his money, but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any particular sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall be-

5. 261 U.S. 525, April 9, 1923.

6. *Idem*, p. 562.

fore the constitutional test.”<sup>7</sup>

To this the Chief Justice counters with the following:

“The boundary of the police power, beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution, is not easy to mark.

\* \* \* \*

“Legislatures, in limiting freedom of contract between employee and employer by a minimum wage, proceed on the assumption that employees in the class receiving least pay are not upon a full level of equality of choice with their employer, and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for those evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound.

“Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe \* \* that while, in individual cases, hardship may result, the restriction will inure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.”<sup>8</sup>

The attitude which the Chief Justice here expresses of allowing the legislative branch of government to try out measures which might tend to solve current problems illustrates a progressive theory of political organization and function. The observation which Mr. Taft makes to the effect that a

minimum wage law might tend to make the case of the oppressed employee worse than it was before, must be admitted to be extremely acute. Undoubtedly a minimum wage requiring the payment of a relatively high rate would mean that inefficient workers could not find employment at all and would finally be eliminated.

The fourth group of cases to be considered in this chapter deals with the determination of proper means for influencing action in picketing cases.<sup>9</sup> The Chief Justice goes through a careful analysis of the interests and claims involved before determining how many representatives of striking laborers may be allowed for each point of ingress and egress of a plant being picketed, and the particular acts which constitute an unlawful annoyance.

The Tri-City Central Trades Council involved in the case of *American Steel Foundries v. Tri-City Central Trades Council, et al* was composed of representatives of thirty-seven trade unions of Granite City, Madison and Venice, towns adjoining one another in Illinois, including electricians, cranemen, mill hands, machinists, and stationary engineers. The District Court for the Southern District of Illinois issued a restraining order which was effective in three respects. It restrained the Tri-City Central Trades Council and fourteen individual defendants (1) from interfering, by use of persuasion, with any person engaged in the employ of the American Steel Foundries; (2) from interfering, by use of persuasion, with any person desiring to be employed by the American Steel Foundries; and (3) from maintaining any pickets. A modification was made in the restraining order by the Circuit Court of Appeals. First, the word “persuasion” was struck out, thereby allowing interference by persuasion; second, picketing was allowed if not done in a threatening or intimidating manner.

Certain provisions of the Clayton Act form the basis of the restraining order issued, and define the proper use of the same. These portions of the law enact that no restraining order can be issued unless neces-

7. 261 U.S. 525, 558-559.

8. *Idem*, pp. 562-563.

9. *American Steel Foundries v. Tri-City Central Trades Council et al*, 257 U.S. 184, argued Jan. 17, 1919; restored to docket for reargument June 1, 1920; reargued Oct. 5,

1920; restored to docket for reargument June 6, 1921; reargued October 4, 5, 1921; decided Dec. 5, 1921.

*Truax v. Corrigan*, 257 U.S. 312, argued Apr. 29, 30, 1920; restored to docket for reargument June 6, 1921; reargued Oct. 5, 6, 1921; decided Dec. 19, 1921.

sary to prevent irreparable injury to property or to a property right of the party making the application. Injury to the business of an employer is within the scope of this provision. It is further enacted that no injunction shall issue against peaceful persuasion to cease employment, peacefully obtaining or communicating information, or peaceably assembling in a lawful manner and for a lawful purpose.<sup>10</sup> These latter provisions apply only to cases growing out of a dispute concerning terms or conditions of employment between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment, and not to such dispute between an employer and persons who are neither ex-employees nor seeking employment.<sup>11</sup>

The question involved in the case is the determination of the extent to which men may go in persuasion and communication and still not violate the right of those whom they would influence. In other words, when is picketing done in a threatening or intimidating manner? Mr. Chief Justice Taft declares that the evidence adduced shows violent methods were used and indicates a continuously threatening attitude of picketers.

The fundamental nature of the problem involved is indicated as being a balancing of interests in the following words of the Chief Justice.

"The object and problem of Congress in sec. 20, and indeed of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other. If, in their attempts at persuasion or communication with those whom they would enlist with them, those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court's duty which the terms of sec. 20 do not modify, so to limit what the prop-

agandists do as to time, manner and place as shall prevent infractions of the law and violations of the right of the employees, and of the employer for whom they wish to work."<sup>12</sup>

"We are social people," declares Mr. Chief Justice Taft, in working out the principles which shall apply to these circumstances. He comes to the conclusion that the "strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business."

"In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of the other in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's actions are not regarded as aggression or a violation of the other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free. \* \* \*

"\* \* \* We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one

10. Clayton Act, 1914, c. 323, Sec. 20, pars. 1, 2. 38 Stat. 738.

11. Duplex Printing Press Company v. Deering, 254 U.S. 443.

12. 257 U.S. 184, pp. 203-204.

which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It becomes a question for the judgment of the Chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."<sup>13</sup>

Thus we are given a rule which applies to this particular case under the circumstances disclosed by the evidence, but which may be varied in other cases in which the similar problem arises and which is not intended for use as a rigid rule applicable to varying circumstances. The result reached by the Chief Justice is a careful balancing of interests. Missionaries do not cause more harm than good, and similarly those who urge their views upon others in the industrial conflict are to do so in accordance with the interests of all concerned and in harmony with the principle that we are social people.

Plaintiffs in the case of *Truax v. Corrigan*<sup>14</sup> were proprietors of a restaurant at Bisbee, Arizona. Defendants were cooks and waiters formerly in the employ of plaintiffs and the labor union and trades assembly of which the cooks were members. The daily receipts of the proprietors were decreased from \$156 to \$75 and the value of their business was decreased from \$55,000 to \$12,000 by reason of a strike of the defendants involving picketing of the plaintiffs' establishment. The proprietors sought an injunction to restrain the defendants from committing acts derogatory to the restaurant business of the owners. The Superior Court of Cochise County upon demurrer dismissed the complaint of the plaintiffs, and its action was affirmed by the Supreme Court of Arizona relying upon an Arizona statute regulating the issuance of restraining orders and injunctions. When the case reached the Supreme Court of the United States the Arizona statute was held invalid for reasons which need not detain us here,<sup>15</sup> and Mr. Chief Justice Taft enumerated a number of acts which had been performed by parties interested in the strike. These acts were declared to consti-

tute an unlawful annoyance of the plaintiffs' business.

"The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs, and customers, and the threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy."<sup>16</sup>

It will be noted that in this case, as in the case of *American Steel Foundries v. Tri-City Central Trades Council, et al*, the acts which were held to constitute the unlawful annoyance were acts which could not be performed if the claims of individuals who wish to continue with their labor, are to be protected. On the other hand, those who seek to persuade others to join with them in strike must be protected in their legitimate appeals to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage.

The study of the cases of this chapter dealing with due process and freedom of contract under the sub-titles of the force of statutes, due process, freedom of contract and the police power, and methods of dealing with picketing, gives further suggestion concerning the political theory of Mr. Chief Justice Taft. With respect to the

13. 257 U.S. 184, pp. 204, 206, 207.

14. 257 U.S. 312.

15. Held to deprive the owner of the business

and premises of his property without due process of law.

16. 257 U.S. 312, 327-328.

force of statutes it shows that the Chief Justice believes that it is the right of the taxpayer whose property alone is taxed 100 per cent of its true value, to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. Another case, however, indicates that the attitude of Mr. Taft is one of due regard for the non-interference by courts with other bodies in their properly assigned duties. The latter point of view, on the whole, prevails.

With respect to due process our study has shown that the head of our Supreme Court has called our attention to the earmarks of a judicial controversy, declaring them to be adversary parties, an issue, the claim of one of the parties against the other, a claim capable of pecuniary estimation, a claim stated and answered in some sort of pleading, and a claim which is to be determined. He has referred to the Court of Industrial Relations of Kansas as a body which has been "miscalled a court." On the question of setting proper limits to administrative discretion his decisions are to the effect that administrative officers cannot perform an act which would in effect graft something on the statute under which they operate, that administrative agents cannot remould contracts entered into by other government representatives, and that specific provisions of statutes under which monthly payments are to be made to parents of minor Indian children, cannot be ignored.

With respect to the delegation of legislative power our inquiry has revealed that the maxim that a legislature may not delegate legislative power, has some qualifications. We have noted also, that administrative boards may perform the function of an agency for marshalling public opinion relative to some issue in our national life.

Under the sub-title of freedom of contract and the police power we noted that the Chief Justice and Justices VanDeVan-

ter and McReynolds dissented, without recording the reasons for their dissent, from the majority opinion in the case holding that the Service Letter Act of Missouri did not place an obstacle or difficulty in the way of the making or termination of contracts of employment and did not prescribe terms or conditions which violated due process under the Fourteenth amendment; and that a vigorous dissent was entered to the decision which held the District of Columbia Minimum Wage Act unconstitutional.

Relative to the methods proper in dealing with picketing the principle was developed permitting one strike representative at each point of ingress and egress of the factory or other establishment against which the strike was aimed. The Chief Justice would also permit requests to customers to withhold their patronage, but such requests must be made in a manner consistent with the full exercise of the real will of the person of whom the request is made.

#### CONCLUSION

One cannot study the decisions of the Chief Justice of the United States Supreme Court without being impressed with his point of view that government is an organism which depends for its continued justification upon maintaining a nice adjustment of the claims and interests of the people who look to it as a means toward the realization of a larger life. The different departments of government are separate, but still intimately related; the functions of government cannot be classified and placed in water-tight compartments.<sup>17</sup> As new conditions arise some shifting of organization may be found necessary to get the things done that need to be done. And in guiding the ebb and flow of the constantly progressing realignment, the exercise of a sound judicial discretion often supplements the provisions of constitutions and laws and custom.

\* \* But frequently new conditions arise which those who were respons-

17. "The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier days of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legisla-

tive, executive, and judicial machinery of the Federal Government, and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare. The pioneer work of Chief Justice White in this field entitles him to the gratitude of his countrymen." Taft, on assuming duties of Chief Justice, 257 U.S. xxiv, xxv-xxvi.

ible for the written law could not have had in view, and to which existing common law principles have never before been applied, and it becomes necessary for the Court to make new applications of both. The power which the Court thus exercises is said to be a legislative power, and it is urged that it ought to be left to the people. That it is more than a mere interpretation of the legislative or popular will, and in the case of the common law that it is more than a mere investigation and declaration of traditional law is undoubtedly true. But it is not the exercise of legislative power as that phrase is used. It is the exercise of a sound judicial discretion in supplementing the provisions of constitutions and laws and custom, which are necessarily incomplete or lacking in detail essential to their proper application, especially to new facts and situations constantly arising. Then, too, legislation is frequently so faulty in proper provision for contingencies which ought to have been anticipated that courts can not enforce the law without supplying the defects and implying legislative intention, although everyone may recognize that the legislative body never thought anything about the operation of the law in such cases and never had any intention in regard to them. Neither constitutional convention nor legislature nor popular referendum can make constitutions or laws that will fit with certainty of specification the varying phases of the subject matter sought to be regulated, and it has been the office of courts to do this from time immemorial. Indeed, it is one of the highest and most useful functions that courts have to perform in making a government of law practical and uniformly just. You can call it legislative power if you will, but that does not put you one bit nearer a sufficient reason for denying the utility and necessity of its exercise by the courts."<sup>18</sup>

In order to maintain harmony within the body politic, the Chief Justice recognizes that groups which have the capacity of affecting the interest of others, should be held responsible for their acts although the existence of the group has not been recognized by governmental fiat. Thus in *United*

*Mine Workers of America et al. v. Coronado Coal Company et al.*<sup>19</sup> we find the following words:

"Undoubtedly, at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the name of its members, and their liability had to be enforced against each member. \* \* \* But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most states, and in many states authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards. \* \* \* More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued \* \* \* and this had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons, capable of suing and being sued. It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of 400,000 members in carrying on, in a wide terri-

18. William Howard Taft, *Popular Government*, 1913, pp. 222, 223.

19. 259 U.S. 344, June 5, 1922.

tory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund would be to leave them remediless."<sup>20</sup>

Furthermore, in order that harmony be maintained within the body politic, it is essential that certain issues be determined on the basis of a national rather than a local point of view. It is a well recognized principle that the several states have jurisdiction over contracts entered into within their borders, both parties to the contract and the subject matter of the contract being with the state. Nevertheless, the Secretary of Agriculture may control such contracts if they affect the meat supply of the nation. The stockyards are but a throat, in the words of the Chief Justice, through which this portion of the food supply passes.

"The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales of the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West,

its ultimate destination known to, and intended by all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."<sup>21</sup>

There has accordingly developed a police power of the national government which is exercised in maintaining harmonious action throughout the whole. For some time there was a question as to whether or not this power existed, but Mr. Chief Justice Taft definitely recognizes it in the case of Board of Trade of the City of Chicago et al. v. Edwin A. Olson, United States Attorney for the Northern District of Illinois, Henry C. Wallace, Secretary of Agriculture and Arthur C. Lueder, United States Postmaster at the City of Chicago.<sup>22</sup>

The federal statute whose constitutionality was questioned in this particular case placed Boards of Trade under the supervision of a commission and set forth certain conditions which should be met if such Boards of Trade were to continue as "contract markets." Among these conditions was one which specified that a Board of Trade which desired to be a "contract market" should adopt a rule permitting the admission as members of lawfully formed co-operative associations of producers having adequate responsibility engaged in the cash grain business if such associations of producers should agree to comply with the rules of the Board applicable to other members, provided that no rule should prevent the return to its members on a pro rata patronage basis the money collected by such association in the business, less expenses. The commission was to hear and determine, after due notice, if the conditions had been met. If not, the commission might suspend the Board of Trade's function as a contract market for a period not to exceed six months, or revoke its designation as such, with an appeal on the record to the Circuit Court of Appeals where the Board was located.

The Board of Trade of the City of Chicago filed a bill avering that if the Board were required to admit representatives of co-operative associations of producers, with

20. 259 U.S. 344, 358-389.

21. *Stafford v. Wallace*, 258 U.S. 515, 527.

22. 262 U.S. 1, April 16, 1923.

the privilege of dividing with their members the proceeds of commissions, less expense, it would greatly impair the value of its memberships to the other members.

In holding the Grain Futures Act constitutional, Mr. Chief Justice Taft pointed out that the question of price dominates trade between the states and that the sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. He declares that the incidental effect which the reasonable rules of membership prescribed by the Act have, if any, in lowering the value of memberships, does not constitute a taking, but is only a reasonable regulation in the exercise of the police power of the national government because the Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest.<sup>23</sup>

It is significant in the development of the idea of the interest of the whole nation as distinguished from the interest of a part, that Mr. Taft here refers to "country-wide commerce" rather than to interstate commerce. Obviously the same thing is meant, but there is an added implication of unity in the term "country-wide commerce" which does not exist in the term "interstate commerce" which has generally been used hitherto. That implication is that there is but one unity; there is a departure from the connotation of the prefix "inter" which suggests that there must be two things for something to be between, and there is a departure from the use of the word "state" which suggests the smaller unit.

As a final word we can do no better than to remind ourselves of the long look into the future which characterizes the thinking of the Chief Justice, and of the change in the idea to the end of government.

"\* \* It is a fundamental error to seek quick action in making needed changes of policy or in redressing wrong. Nations live a long time, and a year or five years is a short period in their life. Most wrongs can be endured for a time without catastrophe. Reforms that are abiding are achieved step by step. It is better to endure wrongs than to effect disastrous changes in which the proposed

remedy may be worse than the evil. \* \* One form of government is better adapted to a particular people than another form. It suits their customs, their idiosyncrasies, their tendencies better; and that is the reason why it is better to grow into a government gradually as we have in three centuries, than to have it thrust upon us."<sup>24</sup>

"\* \* \* One hundred years ago, a representative form of government was looked upon as a means of escaping from an absolute monarchy with all its ills, and from an oligarchy with its defects. It was regarded as the proper instrument to interpret the will of the people into government action. The goal then was personal liberty and equality before the law, and these, it was thought, representative government would secure. Has it not done so with us on the whole? Our machinery does not work perfectly; but, speaking generally, it effects these results. Now that they are secure, there has come into the minds of many a desire not for liberty and equality of opportunity, but a demand for equality of condition. It is a protest against the operation and working out of the right of property, against the inequalities in wealth and comfort present in society. The great advance in the average comfort of living for most people has emphasized by contrast the privation and suffering of what is called the submerged tenth. The usefulness of government is gauged in the judgment of many chiefly by the measure of relief it offers to that part of the population. More than this, the betterment in the condition of all the people, due in part to personal liberty and greater equality of opportunity, has created in the minds of a considerable number a desire for wider equality of comfort and living, and prompts the demand that government shall bring about an economic as distinguished from a political reform.

"Neither Congress nor a state legislature has it within its power to work such economic changes, even though they were possible. That, however, is not an excuse in the minds of the anarchistic, communistic, or socialist assailants of our representative government. And even

23. 262 U.S. 1, ff.

24. William Howard Taft, James Stokes Lectureship on Politics, 1921, pp. 6, 7, 15.

with those who would refuse to class themselves with such groups, there is discontent which finds expression against our representative system, because the representatives do not seem to say and

do the things against the existing property system which these discontented feel. All this is dissatisfaction not with government, representative or otherwise, but with the existing social order."<sup>25</sup>

25. William Howard Taft, James Stokes Lectureship on Politics, 1921, pp. 10-12.

## THE TRIAL LAWYER AND HIS ART

(Continued from Page 12)

seen lawyers of vast prestige, due to their having held high official positions, pitted against a rustic and obscure member of the

bar without polish and savoir faire but with a tremendous amount of conviction in his voice and sincerity in his actions. And repeatedly he has seen these distinguished gentlemen of pomp and power lose out to the rustic whom they treated with polite disdain.

## THE PRESIDENT'S PAGE

(Continued from Page 14)

stimulated in the belief that the results are well worth the effort. There is an intense interest on the part of laymen in the endeavors of the bar to simplify and modernize the administration of justice, and to raise the standards of the practice of the law. More important still, there is an even more intense interest on the part of lawyers themselves in the proposed reformation of judicial processes. Not only throughout

California but throughout the United States, the entire profession is taking note of the trend of events, and a great majority of the members of the bar are lending the reform movement their active aid. The assistance of every member of the profession is needed.

May 1928 be a year signalized by earnest, self-sacrificing, cordial co-operation on the part of all members of the bar for the happy fruition of the purposes and ideals of our profession!

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